Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

CHARLES FLOYD NESBITT,

Petitioner,

vs.

STATE OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the West Virginia Supreme Court of Appeals erred in denying the Petitioner the right to Appeal to his conviction for three counts of Sexual Assault in the First Degree when the Indictment was defective for failing to include a material element of the offense;

II. Whether the West Virginia Supreme Court of Appeals erred in denying the Petitioner the right to Appeal to his conviction for three counts of Sexual Assault in the First Degree when the Prosecuting Attorney engaged in misconduct, in the presence of the jury, that attacked the Petitioner invoking his Fifth Amendment right against self incrimination;

III. Whether the West Virginia Supreme Court of Appeals erred in denying the Petitioner the right to Appeal to his conviction for three counts of Sexual Assault in the First Degree when the Prosecuting Attorney's misconduct and judicial coaching of the Prosecutor in presentation of the State's case resulted in a mistrial to which Double Jeopardy attached and barred subsequent prosecution;

IV. Whether the West Virginia Supreme Court of Appeals erred in denying the Petitioner the right to Appeal to his conviction for three counts of Sexual Assault in the First Degree when the Petitioner was not afforded the right to speedy trial.

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STATEMENTS OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner is seeking review of an Order entered October 16, 1997 by the West Virginia Supreme Court of Appeals, denying the Petitioners discretionary appeal from a conviction for three (3) counts of Sexual Assault in the First Degree in the Circuit Court of Upshur County, West Virginia on the 24th day of April 1996. Pursuant to Title 28 *United States Code* § 1254(1) this Court has Jurisdiction, by a Petition for Writ of Certiorari to review the West Virginia Supreme Court of Appeal's decree.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

1. Amendment XIV, Section 1, United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor snall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service, in time of war or public danger; nor any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use, without just compensation.

IV. Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

V. *West Virginia Code*, § 61-8B-3

(a) A person is guilty of Sexual Assault in the First Degree when:

(1) Such person engages in sexual intercourse or sexual intrusion with another person and, in so doing:

(I) Inflicts serious bodily injury upon anyone; or

(ii) Employs a deadly weapon in the commission of the act; or

(2) Such person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is eleven years old or less.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than fifteen nor more than thirty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in the penitentiary not less than fifteen nor more than thirty-five years.

VI. *West Virginia Code*, § 61-8B-2, Lack of Consent

(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.

(b) Lack of consent results from:

(1) forcible compulsion; or

(2) incapacity to consent; or

(3) if the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(c) a person is deemed incapable of consent when such person is:

(1) less than 16 years old; or

(2) mentally defective; or

(3) mentally incapacitated; or

(4) physically helpless.

STATEMENT OF THE CASE

Pursuant to an indictment captioned *State of West Virginia v. Charles Floyd Nesbitt*, Case No. 94-F-56, filed in the Circuit Court of Upshur County, West Virginia, on September 4, 1994, the Petitioner was charged with one (1) count of Aggravated Robbery in violation of *West Virginia Code*, § 61-2-12, and three (3) counts of Sexual Assault in the First Degree in violation of *West Virginia Code*, § 61-8-3. These charges arose out of a consensual sexual encounter the Petitioner had with the alleged victim in this case. Subsequent to said encounter the alleged victim pressed criminal charges against the petitioner alleging he had forced her to engage in sexual acts.

On December 18, 1995, after various continuances at the hands of the Prosecuting Attorney for Upshur County West Virginia, this matter came on for trial. A mistrial was declared due to the Prosecuting Attorney's inability to establish the chain of evidence for the admissibility of DNA testing and due to the Trial Court's coaching of the Prosecutor on the same. A second trial was held on April 22, 23, and 24, 1996, over the objection of trial counsel to further prosecution in violation of the Petitioner's Double Jeopardy rights. During the second trial, and immediately prior to the Prosecuting Attorney beginning his cross-examination of the Petitioner, the Court cautioned the Prosecuting Attorney (out of the presence of the jury) not to cross-examine the Petitioner "with regard to his not saying something or remaining silent." The first question from the Prosecuting Attorney on cross-examination of the Petitioner was "Mr. Nesbitt, is it true that the very first time anyone knew that you admitted to having sex with Nicole White was yesterday morning when Mr.

Hawkins told the jury about that in opening statements." The trial admonished the Prosecuting Attorney and attempted to cure the misconduct with a corrective instruction to the jury.

On April 24, 1996, the jury returned a verdict of guilty on the three (3) counts of Sexual Assault in the First Degree, and not guilty on the one (1) count of Aggravated Robbery contained in the indictment. After denying the Petitioner's post-trial motions, the Court sentenced the Petitioner to three (3) consecutive sentences of fifteen (15) to thirty-five (35) years in the penitentiary. The Petitioner filed a discretionary Petition for Appeal to the West Virginia Supreme Court of Appeals on the 13th day of May, 1997. An order was entered by the West Virginia Supreme Court of Appeals refusing said Petition for Appeal on the 16th day of October 1997.

STATE OF PROCEEDINGS IN STATE COURT

This matter has been decided by the Highest Court of the State of West Virginia. The West Virginia Supreme Court of Appeals refused to grant the Petitioner an appeal of his conviction by an Order entered October 16, 1997.

The Petitioner was convicted by the Trial Court (the Circuit Court of Upshur County, West Virginia) by order entered April 26, 1996 and sentenced by an order entered November 13, 1996.

The issues contained in this writ of certiorari were raised in the Trial Court proceedings as well as in the

Petitioner's Petition for Appeal to the West Virginia Supreme Court of Appeals. All rulings were adverse to the Petitioner.

ARGUMENT

I.

The Petitioner contends that his conviction for three counts of Sexual Assault in the First Degree are invalid in that the indictment returned against him which sets forth those charges fails as a matter of law to allege a material element of the offense. In *Hambling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), this Court held, "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' " *Hambling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), citing *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1882) (emphasis added). The Trial Court and the West Virginia Supreme Court of Appeals disregarded existing West Virginia statutory law setting forth lack of consent as an element of a sexual offense and case law consistent with *Hambling*. Specifically, in *State v. Knight*, 285 S.E.2d 401 (W.Va. 1981), the West Virginia Supreme Court of Appeals held, "the first necessary element of a sexual assault crime is lack of consent." If there is consent between the parties, no crime has occurred.

In the instant case, the Indictment returned against the Petitioner failed to set forth the material and necessary element of lack of consent of the victim of the alleged sexual assault. This element is made necessary under the provisions of *West Virginia Code*, 61-8B-2. Accordingly, the indictment's failure to allege lack of consent by the victim renders the indictment fatally defective in that a necessary element of the offense is absent.

II.

Under the Fifth and Sixth Amendments of the United States Constitution, an accused is guaranteed the right to receive a fair trial and a decision from an impartial jury. Attempts by a prosecutor to improperly prejudice the jury against the accused effectively deny an accused the right to receive a fair and impartial hearing. As this Court has held, "the prosecutor has an ethical responsibility to safeguard against these abuses," and the prosecutor may "strike hard blows, but not foul ones". *United States v. Ash*, 413 U.S. 300, at 320 (1973); citing *Berger v. United States*, 295 U.S. 78, 88 (1935); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

In the trial of the Petitioner, the Prosecutor acted improperly and substantially impaired the Petitioner's ability to receive a fair and impartial hearing by making improper inferences to the jury. Prior to the cross-examination of the Petitioner by the Prosecuting Attorney, the Court, in an unusual move, gave an explicit instruction and warning to the Prosecutor concerning any reference to the failure of the Petitioner to make any statements to

law enforcement authorities. The following exchange occurred:

> BY THE COURT: Now I want to caution the Prosecuting Attorney that examination of the defendant with regard to his not saying something or remaining silent or not doing anything is an exercise of a constitutional right and cannot be used against him. You understand that?
>
> MR. THURMAN: Yes sir.

Despite this warning from the Court and affirmative response from the Prosecutor, the first question that the Prosecutor asked after the jury was seated was, "Mr. Nesbitt, is it true that the very first time anyone knew that you admitted to having sex with Nicole White was yesterday morning when Mr. Hawkins told the jury about that in opening statements?" The Petitioner's counsel immediately objected and demanded a mistrial which motion was denied.

This exchange indicates the willingness of the Prosecutor to attempt to secure a conviction through improper conduct in absolute disregard of the Petitioner's constitutional rights. The fact that the presiding Judge took the unusual step to warn the Prosecutor against making statements or asking questions of the Petitioner about his failure to make a statement immediately prior to the question being asked illustrates the willingness of the Prosecutor to ignore the basic constitutional rights of the Petitioner in an attempt to secure a

conviction. The question as propounded by the Prosecutor was directed at drawing a negative inference in regards to the Petitioner's fundamental right to remain silent about a critical issue in the proceeding. Despite attempts to cure the prejudice, the improper actions of the Prosecutor in asking this question in front of the jury resulted in substantial and irreversible prejudice.

III.

The Petitioner further contends that he was improperly held to answer twice to the same offense in violation of the Double Jeopardy clause of the Fifth Amendment to the United States Constitution. This contention is based upon the fact that the Petitioner was originally tried in December, 1995. In that proceeding, Counsel for the Petitioner was forced to request a mistrial during the State's case in chief after the Prosecutor, on direct examination, repeatedly asked questions of witnesses concerning exhibits that he had failed to admit into evidence causing the Trial Court to conclude that jury had been hopelessly confused and in fact that the court itself become confused as to evidence before it. In *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), this Court provided a uniform standard to determine whether prosecutorial misconduct triggers the jeopardy bar to a second trial. In *Kennedy*, the Court limited the bar to a second prosecution after a successful defense motion for a mistrial to those circumstances where the Trial Court specifically makes a finding of fact that the conduct of the prosecution was intended to provoke the defendant into moving for a mistrial. The State continued to attempt to improperly admit evidence and testimony of witnesses

despite objections by counsel for the Petitioner, admonishments by the Court, and corrective instructions to the jury to disregard improper testimony. Further, during the aforesaid chaos and misconduct by the prosecution, the Trial Court engaged in attempts to coach the Prosecuting Attorney on how to present his case. The Court eventually granted a mistrial and as a ground for granting the same acknowledged that the Petitioner was prejudiced by the Court overstepping its bounds:

> BY THE COURT: Just the mere fact that we may straighten up the chain of evidence, I don't know if that will cure the prejudice that may adhere to the Defendant in this case, especially because of the Court overstepping its bounds in instructing the Prosecuting Attorney how to present his case, on two separate occasions, which counsel objected and moved for a mistrial.

It is clear from the comments of the Court that the actions of the Prosecutor threw the Petitioner's trial into utter chaos. The Prosecutor's presentation of the case resulted in confusion to such an extent that the Court itself took improper steps to instruct the Prosecutor on the presentation of evidence. As a result of the improper actions of the Prosecution and the Trial Court, the Petitioner was forced to seek a mistrial. Since the mistrial was necessitated by the improper actions of the State and the Trial Court subsequent to the swearing in and seating of

the jury, the retrial of the Petitioner in this case unconstitutionally demanded that he be held to answer twice for the same offense.

IV.

The Petitioner contends he was denied his right to a speedy trial. The Petitioner was indicted in September 1994 before the Circuit Court of Upshur County, West Virginia. The State of West Virginia, through its Prosecuting Attorney moved the Court for a continuance until the next term of Court for the purpose of obtaining DNA analysis. The Petitioner objected and moved for a trial in the same term of Court in which his indictment was presented. On March 29, 1995, counsel for the Petitioner moved for a continuance based upon the State's failure to timely provide discovery to the Petitioner. During the hearing on said motion the Court granted the Petitioner's motion as follows:

> BY THE COURT: This case is not ready for trial. The State is ordered and directed to comply with the discovery request . . . this is a serious matter. This is not a misdemeanor case. More serious timewise than second degree murder. They're entitled to have that and I want them to have that.

The trial was then scheduled for August 1995. Again, the State failed to comply with the Court's discovery orders, and counsel for the Petitioner was forced to move

for another continuance. The Trial Court granted the continuance on the grounds that the State of West Virginia provides DNA analysis discovery twenty (20) days prior to trial, thus precluding the Petitioner from obtaining expert analysis of the same in time for the scheduled trial. Defense counsel requested that the continuance be charged to the State based on the late filing of discovery. However, the Trial Court refused to charge said continuance to the State when continuing the case to the next term of Court and stated:

> MR. STOBBS: Well, we think it should be charged to the State, because this . . .
>
> BY THE COURT: No, we'll try it at this term if you want to try it this term.

During the same argument, following the granting of Petitioner's motion to continue, the following exchange also occurred:

> MR. STOBBS: But, however, we feel that this continuance is necessitated because we didn't get the discovery. It's not putting us in a position to make an argument about a three-term rule at this point, but we – and we don't anticipate anything that will cause another motion for a continuance, but we don't feel its our fault. If the Court wants to charge to us, we'd like to take exception to that part of the ruling, if we could, and I don't mean to be disrespectful –

BY THE COURT: If you take exception to it, then we'll try it at this term. Now, just however you want to go.

MR. STOBBS: I guess my question, with all due respect to the Court, is how can we be ready to do that by the end of the month. I mean, how can you realistically expect us to get it all together.

BY THE COURT: Then ask for a continuance to the next term and I'll grant it. I'm not going to get put in a position, that I've not given this man a speedy trial, or I'm letting three terms go by.

The case was then set for trial in December 1995. The jury was selected, sworn and the trial commenced. During the State's case in chief, the prosecutors presentation of witnesses and attempts to establish resulted in such abject confusion and chaos that counsel for the Petitioner was forced to move for a mistrial. Said motion was made following repeated objections by counsel for the Petitioner, admonishments by the Court, and corrective instruction to the jury to disregard. However, despite the same, the Prosecuting Attorney continued to attempt to improperly admit evidence and testimony of witnesses.

BY THE COURT: Well, that's not the purpose of my comments here. This chain of evidence is so screwed up at this point in time, that I don't know what the chain of evidence is in

this case. Can you handle this case, Mr. Thurman?

MR. THURMAN: Yes, sir.

BY THE COURT: Well, it doesn't look like it. We'll take a fifteen minute recess.

Thereafter a motion for mistrial was made based upon the aforesaid conduct. As a result of the said motion for a mistrial the Court stated as follows:

BY THE COURT: Well, the Court has, on two occasions, I'm afraid, overstepped its bounds, in instructing the Prosecuting Attorney in how to present his case. Also, the Court has to instruct the jury to disregard, at one time, the testimony of the results of DNA testing, which, at that point in time, were not admissible. Let me restate that. A witness testified about certain results of some DNA testing, which subsequently, the Court realized was not admissible, because of the failure to establish the chain of evidence. Just the mere fact that we may straighten up the chain of evidence, I don't know if that will cure the prejudice that may adhere to the Defendant in this case, especially because of the Court overstepping its

> bounds in instructing the Prosecuting Attorney how to present his case, on two separate occasions, which counsel objected and moved for a mistrial. I think the motion is meritorious. I'm going to grant the motion. I'm going to grant a mistrial in this case and continue it till the next term for trial. We'll start over again in the January term of Court . . .

The matter was then set for trial in the next term of Court. In April, 1996, a jury convicted the Petitioner on three Counts of Sexual Assault in the First Degree. During this trial, the Prosecuting Attorney, again, engaged in misconduct and attacked the Petitioner's use of his Fifth Amendment Right against self-incrimination.

As a result of the aforesaid continuances that were all chargeable to the State for various misconduct, the Petitioner did not receive a trial until the fifth term of Court following his indictment. The misconduct of the Prosecution and the Trial Court in the instant case cannot and should not be attributed in any fashion to the Petitioner. The conduct necessitating the continuance and retrial of the Petitioner's case operated as an absolute and impenetrable bar to the Petitioner's right to receive a fair and speedy trial in violation of the Petitioner's constitutional rights.

CONCLUSION

Petitioner was improperly denied his right to appeal to the West Virginia Supreme Court of Appeals from his criminal conviction in the Circuit Court. A writ of certiorari should issue so that this Court may review the entire record and reverse the Circuit Court of Upshur County West Virginia and vacate the Petitioner's conviction.

Respectfully submitted,

CHARLES FLOYD NESBITT
Petitioner by Counsel

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of October, 1997, the following order was made and entered:

State of West Virginia, Plaintiff
Below, Respondent

vs.) No. 971045

Charles Floyd Nesbitt, Defendant
Below, Petitioner

On a former day, to-wit, May 28, 1997, came the petitioner, Charles Floyd Nesbitt, by James E. Hawkins, Jr., and R. Russell Stobbs, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Upshur County, rendered on the 13th day of November, 1996, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ Rodney Teal
Clerk, Supreme Court
of Appeals

IN THE CIRCUIT COURT OF UPSHUR COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

CASE NO. 94-F-56

VS.

CHARLES FLOYD NESBITT,

DEFENDANT

TRIAL ORDER

On the 22nd day of April, 1996, came the State of West Virginia, by William C. Thurman, Prosecuting Attorney in and for Upshur County, West Virginia, and also came the Defendant, Charles Floyd Nesbitt, in his own proper person, and being represented and assisted by James E. Hawkins, Jr. and R. Russell Stobbs, co-counsel for the Defendant.

Thereupon, it appearing to the Court that the Defendant has heretofore received a true copy of the Indictment heretofore returned against him, the Court proceeded to fully explain to the Defendant the nature of the charges contained in said Indictment and the penalties therefore, as prescribed by the laws and statutes of the State of West Virginia, and the legal consequences of a plea of guilty thereto, and the various pleas which the Defendant might enter upon arraignment and did further explain to the Defendant all of the Defendant's constitutional and legal rights, as prescribed by the laws and statutes of the State of West Virginia, and all other matters arising thereon or being pertinent thereto, and at the conclusion thereof the Defendant stated, in his own proper person, that he fully understood all matters

explained to him by the Court and that he was ready to be arraigned upon the Indictment in this case.

Thereupon, the Court inquired of the Defendant if the Defendant desired to waive the formal reading of the Indictment herein, and with the advice and consent of said counsel, the Defendant waived all rights to the formal reading of the Indictment herein.

Thereupon, the Court proceeded to arraign the Defendant upon the charge of Aggravated Robbery, a felony, as contained in Count One of said Indictment, and further upon the charges of Sexual Assault in the First Degree as contained in Counts Two, Three and Four of the Indictment herein returned against him at the Bar of the Court, and the Defendant, Charles Floyd Nesbitt, for answer and plea thereto, stated in his own proper person, that he is not guilty of the offenses of Aggravated Robbery and Sexual Assault in the Third Degree, as charged and contained in Counts One, Two, Three and Four of the Indictment herein, which said plea of not guilty is now accepted and received by the Court and made a part of the record in this case.

Thereupon, the Defendant, by counsel, renewed his Motion to Dismiss Counts Two, Three and Four of said Indictment, which said Motion to Dismiss was denied and overruled for the same reasons previously cited by the Court.

Thereupon, the Defendant, by counsel, moved this Court to dismiss the Indictment herein according to the Three Term Rule, which said motion was denied and overruled for the same reasons previously cited by the Court.

Thereupon, the Defendant, by counsel, moved this Court for a jury view, which said motion was granted and sustained, which view would be held at the conclusion of the State's evidence.

Thereupon, the Defendant, by counsel, noted his continuing objection to statistical DNA evidence.

Thereupon, the Clerk called the list of witnesses to be sworn, and the witnesses present came forward and were sworn to testify.

Thereupon, the Defendant, by counsel, moved this Court to exclude witnesses, which motion was granted and sustained, and the Court instructed said witnesses regarding sequestration, and not to discuss this case among themselves or with anyone else, excepting the attorneys in this case.

Thereupon, came the jury, that is to say: Dean A. Smith, Martin Heater, Benjamin D. Post, Jamie Dawn Johnston, Bradley Tenney, Jammie Michael Wamsley, Carol June Smith, Shirley A. Tenney, Donald Ray Jeffries, Ronald Steven Lewis, Paul Allan Spencer and William R. Hefner, twelve (12) lawful and good men and women, together with one (1) alternate juror, Thomas Mason Bunner, said jurors having been previously selected and tried according to law on the 1st day of April, 1996, to serve as jurors in this case.

Thereupon, the twelve (12) jurors and one (1) alternate juror were duly sworn by the Clerk of this Court upon their respective oaths for the trial of this case.

And of this, the said Defendant puts himself upon the country and issue is thereon joined.

Thereupon, at the hour of 9:28 o'clock a.m., the State of West Virginia commenced its opening statement, and at the hour of 9:38 o'clock a.m., counsel for the Defendant commenced his opening statement, and after a time, the Court recessed at the hour of 9:50 o'clock a.m.

Thereupon, at the hour of 10:30 o'clock a.m., counsel for the Defendant stipulated to the Court that the Defendant did have vaginal sexual intercourse with Nicole Dawn White, that the DNA testing on the semen extracted from the panties and vagina of Nicole Dawn White is from the Defendant, and that the Defendant's jumpsuit and camo jacket revealed no DNA evidence. The State of West Virginia accepted said stipulation.

Thereupon, after opening statements by both the State of West Virginia, by said Prosecuting Attorney, and the Defendant, by counsel, the State of West Virginia, by said Prosecuting Attorney, proceeded with the taking of testimony and the production of evidence on behalf of the State of West Virginia, and adduced the sworn testimony of Nicole Dawn White at the hour of 10:32 o'clock a.m., and at the hour of 11:28 o'clock a.m., counsel for the Defendant cross-examined said witness, and after a time, the Court recessed at the hour of 12:05 o'clock p.m.

Thereupon, the Court resumed at the hour of 1:10 o'clock p.m., all jurors present, and thereupon, the trial continued with the cross-examination of Nicole Dawn White.

Thereupon, at the hour of 1:30 o'clock p.m., the State adduced the sworn testimony of Dr. Thomas Schmitt, and at the hour of 1:55 o'clock p.m., counsel for the Defendant cross-examined said witness.

Thereupon, at the hour of 2:14 o'clock p.m., the State adduced the sworn testimony of Marsha Green, R.N.

Thereupon, at the hour of 2:30 o'clock p.m., the Court recessed and resumed at the hour of 2:53 o'clock p.m., all jurors present.

Thereupon, the Defendant, by counsel, advised the Court that the Defendant desired to make a motion out of the presence of the jury, and the Court, deeming it proper so to do, directed the jury to retire to the jury room.

Thereupon, the jury was excused for a break while the Court conducted an *in camera* hearing regarding Defendant's motion to exclude the testimony of Lt. Darrell Bennett and Chief Fred M. Gaudet upon the Defendant's accusation that the State of West Virginia violated the sequestration order. Upon hearing thereupon, and after due and mature consideration, the Court finds that the State of West Virginia did not violate the sequestration order.

Thereupon, at the hour of 3:02 o'clock p.m., the jury returned, and at the hour of 3:30 o'clock p.m., counsel for the Defendant continued his cross-examination of Lt. Darrell Bennett.

Thereupon, at the hour of 3:54 o'clock p.m., the State adduced the sworn testimony of Patrolman Jeff Craig, and at the hour of 4:23 o'clock p.m., counsel for the Defendant cross-examined said witness.

Thereupon, at the hour of 4:37 o'clock p.m., the hour growing late, further proceedings are hereby postponed and continued until Tuesday, April 23, 1996, at the hour

of 9:00 o'clock a.m. on said day, at which time all parties herein are directed to return into this Court.

Thereupon, on Tuesday, April 23, 1996, at the hour of 9:05 o'clock a.m., Court resumed and advised the Defendant of his constitutional rights regarding his testimony.

Thereupon, at the hour of 9:07 o'clock a.m., the jury was brought into the Courtroom and with all parties being present, roll call was conducted of the jury and all were present.

Thereupon, at the hour of 9:08 o'clock a.m., the State continued its case in chief with the testimony of Police Chief Fred M. Gaudet, and at the hour of 10:03 o'clock a.m., counsel for the Defendant cross-examined said witness.

Thereupon, at the hour of 10:41 o'clock a.m., the Court recessed, and at the hour of 10:50 o'clock a.m., the State rested its case in chief.

Thereupon, counsel for the Defendant renewed his motion to Dismiss their Indictment herein, and after hearing argument of counsel, the Court denied and overruled said Motion to Dismiss the Indictment.

Thereupon, counsel for the Defendant moved the Court for a judgment of acquittal with regard to Count One of said Indictment, which said motion for a judgment of acquittal was denied and overruled.

Thereupon, counsel for the Defendant renewed his motion for a judgment of acquittal with regard to Counts Two, Three and Four of said Indictment, which said motion for a judgment of acquittal was denied and overruled for the reasons previously stated by the Court.

Thereupon, counsel for the Defendant moved for a dismissal of this case due to lack of sufficient evidence, which said motion for a dismissal was denied and overruled, and the Court expressly finds that the State of West Virginia has established a prima facie case as to each Count of the Indictment in this case.

Thereupon, at the hour of 11:05 o'clock a.m., counsel for the Defendant requested a ten minute recess, and at the hour of 11:17 o'clock a.m., Court resumed.

Thereupon, counsel for the Defendant commenced presenting his case in chief with the sworn testimony of Sue Marsh at the hour of 11:20 o'clock a.m., Sheena Zickefoose at the hour of 11:26 o'clock a.m., Tim Sapp at the hour of 11:33 o'clock a.m., and the Defendant, Charles Floyd Nesbitt at the hour of 11:38 o'clock a.m.

Thereupon, the Court recessed at the hour of 11:58 o'clock a.m. and resumed at the hour of 1:17 o'clock p.m., with the jury and all parties being present.

Thereupon, at the hour of 1:18 o'clock p.m., the State cross-examined the Defendant, Charles Floyd Nesbitt. Upon objection by Counsel for the Defendant, the jury was sent out and counsel for Defendant moved for a mistrial. The Court heard argument of counsel and thereafter, the Court took a recess to review the law and facts herein, and thereafter, the Court returned, advising the parties that upon due and mature consideration of the issues raised by said motion for mistrial, the Court is of the opinion to and did accordingly deny and overrule said motion. Counsel for the Defendant requested a cautionary instruction to the jury.

Thereupon, at the hour of 1:46 o'clock p.m. the jury returned and the Court advised the jury by a cautionary instruction.

Thereupon, at the hour of 2:00 o'clock p.m., the jury was excused for a break while the Court conducted an *in camera* hearing regarding the oral statements made to Patrolman Jeff Craig on December 28, 1993, by the Defendant. Whereupon, the Court finds that the Defendant's oral statements are admissible.

Thereupon, at the hour of 2:27 o'clock p.m., the State's cross-examination of the Defendant continued, and at the hour of 2:39 o'clock p.m., the Defendant rested his case.

Thereupon, at the hour of 2:40 o'clock p.m., the Court recessed and resumed at the hour of 2:58 o'clock p.m.

Thereupon, the State informed the Court that it had no rebuttal witnesses and the jury was brought in to the Courtroom at the hour of 3:00 o'clock p.m.

Thereupon, at the hour of 3:04 o'clock p.m., the hour growing late, further proceedings are hereby postponed and continued until Wednesday, April 24, 1996, at the hour of 9:00 o'clock a.m. on said day, at which time all parties herein are directed to return into this Court, and Court adjourned at the hour of 3:05 o'clock p.m.

Thereupon, the Defendant, counsel for the Defendant and the State of West Virginia met in the Judge's chambers with the Court to review the instructions herein, and at the hour of 4:50 o'clock p.m., recessed for the day.

Thereupon, on Wednesday, April 24, 1996, at the hour of 9:00 o'clock a.m., the Court resumed with the jury and all parties being present.

Thereupon, the Court, on the record, and out of the presence of the jury, reviewed all instructions and gave counsel opportunity to state their exceptions and objections on the record.

Thereupon, counsel for the Defendant renewed his motion for judgment of acquittal, which said motion was denied and overruled for the reasons previously stated.

Thereupon, counsel for the Defendant renewed his motion for a mistrial, which said motion was denied and overruled for the reasons previously stated.

Thereupon, there being no additional evidence or testimony to offer on behalf of the Defendant, the Court, after having first completed its consideration of the instructions to be given to the jury in this case, instructed the jury upon the law applicable to the evidence and testimony presented to the jury in this case and to the issues arising herein, by means of reading said instructions to said jury.

Thereupon, the jury, after having first heard the closing arguments of said Prosecuting Attorney, on behalf of the State of West Virginia, and of counsel for the Defendant as well, returned into the jury room at the hour of 10:48 o'clock a.m. to consider of the verdict to be returned in this case, except for the alternate juror who was discharged from further service in regard to this case.

Thereupon, at the hour of 11:18 o'clock a.m., the jury returned into open Court, at the bar thereof, and the

Foreman of said jury, namely, Donald Jeffries, announced to the Court that the jury had arrived at and agreed upon the verdict herein, and upon being directed by the Court to do so, said Foreman delivered to the Court, at the bar thereof, the following verdict, said verdict having been recorded in accordance with the laws and statutes of the State of West Virginia and attached to the reverse side of the Indictment herein:

FORMS OF VERDICT

FIRST COUNT

We, the jury, find the Defendant, Charles Floyd Nesbitt, not guilty of Aggravated Robbery, a felony, as charged in the First count of the Indictment.

4/24/96 — Date

/s/ Donald Jeffries — Foreperson

SECOND COUNT

We, the jury, find the Defendant, Charles Floyd Nesbitt, guilty of Sexual Assault in the First Degree, a felony, as charged in the Second Court of the Indictment.

4/24/96 — Date

/s/ Donald Jeffries — Foreperson

THIRD COUNT

We, the jury, find the Defendant, Charles Floyd Nesbitt, guilty of Sexual Assault in the First Degree, a felony, as charged in the Third Count of the Indictment.

4/24/96	/s/ Donald Jeffries
Date	Foreperson

FOURTH COUNT

We, the jury, find the Defendant, Charles Floyd Nesbitt, guilty of Sexual Assault in the First Degree, a felony, as charged in the Fourth Count of the Indictment.

4/24/96	/s/ Donald Jeffries
Date	Foreperson

Thereupon, the Defendant, by counsel, indicated to the court that the Defendant desired to have the jury polled. Thereupon, the Clerk of this Court polled the jury as to their verdict and each of the twelve (12) jurors indicated verbally that the verdict returned by the Foreperson was their true and actual verdict.

Thereupon, the State of West Virginia, by said Prosecuting Attorney, informed the Court that the State of West Virginia had no objection as to the form of said verdicts, and the Defendant, by counsel, informed the Court that he had no objection as to the form of said verdicts, and the Court is of the opinion to and does hereby accept said verdicts and accordingly, ORDERS the same be filed and made a part of the record herein.

Thereupon, it appearing to the Court that the jury was no longer needed for further service in this case, said jury was discharged and released from further service herein.

It is accordingly adjudged and ORDERED that the Defendant is guilty of the three (3) offenses of Sexual Assault in the First Degree, each felonies, as charged in the Second, Third and Fourth Counts of the Indictment herein, upon the verdicts of the jury empaneled to try this case, and that the Defendant now stands convicted of the offenses of Sexual Assault in the First Degree, felonies, as charged in the Second, Third and Fourth Counts of the Indictment herein.

Thereupon, the Defendant, by counsel, orally indicated to the Court that the Defendant desired to make certain post trial motions, including a motion to set aside the verdicts herein, and the Court, deeming it proper so to do, directed Counsel for Defendant to file all post-trial motions and serve a copy of same upon the Prosecuting Attorney within ten (10) days of the entry of this Order.

Thereupon, it is further adjudged and ORDERED that the Defendant submit himself to the mandatory Sexual Offender Testing, and the Sheriff of Upshur County is ORDERED to arrange said testing.

Thereupon, the Court deeming it proper to do so, does hereby adjudge and ORDER that all further proceedings in this case be and the same are hereby postponed and continued until May 7, 1996, at the hour of 1:00 o'clock p.m. on said day, and all parties hereto are directed to return into this Court on said day for further proceedings as the law may require.

Thereupon, it is further adjudged and ORDERED that the bond previously set for the Defendant is hereby withdrawn, vacated and held for naught, by reason that (1) the Defendant is not entitled to bond upon his convictions for Sexual Assault in the First Degree, three felonies, as the same are determined to be crimes of violence, and (2) the requirements of mandatory HIV testing pursuant to West Virginia Code 16-3C-2(f), and the Defendant is hereby remanded to the custody of the Sheriff of Upshur County, West Virginia, to be by the latter placed in the Upshur County Jail situate in the City of Buckhannon, Upshur County, West Virginia, to await further proceedings herein as aforesaid.

It is further adjudged and ORDERED that the Clerk of this court make and prepare two (2) certified copies of this Order and transmit the same by United States mail to (1) James E. Hawkins, Jr., Co-Counsel for the Defendant, P.O. Box 2286, Buckhannon, West Virginia 26201, and (2) R. Russell Stobbs, Co-Counsel for the Defendant, P.O. Box 1168, Weston, West Virginia 26452, which said copies shall serve as sufficient and adequate notice for all matters had and taken herein.

ORDER ENTER: April 26, 1996

/s/ T. H. Keadle
Judge of the Circuit Court
of Upshur County, WV

IN THE CIRCUIT COURT OF
UPSHUR COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS. CASE NO. 94-F-56

CHARLES FLOYD NESBITT,

DEFENDANT.

SENTENCING ORDER

On the 7th day of November, 1996, came the State of West Virginia, by William C. Thurman, Prosecuting Attorney in and for Upshur County, West Virginia, and also came the Defendant, Charles Floyd Nesbitt, in his own proper person, and being represented and assisted by James E. Hawkins, Jr. and R. Russell Stobbs, co-counsel for the Defendant, upon all prior proceedings had and taken herein.

Thereupon, pursuant to and in conformity with a prior Order of this Court made and entered in this case, the written report of the presentence investigation, together with the findings and recommendations contained therein, prepared by Bonnie Helmick, Probation Officer for the 26th Judicial Circuit of the State of West Virginia, was inspected by the Court, and is now accepted and received by the Court and is ORDERED filed and made a part of the record in this case, at the conclusion thereof, the Court inquired of the Defendant if the Defendant had any objection to the contents of said report and the Defendant stated to the Court that the Defendant did object to contents of said report and desired to call witnesses and elicit testimony thereon.

Thereupon, the Defendant, by counsel, called Bonnie Helmick, Patrick Frame, and Sherry Claus to testify on behalf of the Defendant, Charles Floyd Nesbitt.

Thereupon, the Court took time to consider of the matters contained in said written report of the said Bonnie Helmick, Probation Officer for the 26th Judicial Circuit of the State of West Virginia, together with the findings and recommendations contained therein.

Thereupon, pursuant to and in conformity with a prior Order of this Court made and entered in this case, the State of West Virginia, tendered to the Court the written report of the Sexual Offender Evaluation dated September 30, 1996, conducted by Dr. Thomas R. Adamski, Forensic Psychiatrist, which said report, together with the findings and recommendations contained therein, after having been first duly seen and inspected by the Court, is now accepted and received by the Court and is ORDERED filed and made a part of the record in this case, and at the conclusion thereof, the Court inquired of the Defendant if the Defendant had any further objections to the contents of said report and the Defendant stated to the Court that the Defendant did not have further objections to the contents of said report and had nothing further to offer in alteration or mitigation of the facts and allegations contained therein.

Thereupon, the Court took time to consider of the matters contained in said written report of the said Dr. Thomas R. Adamski, Forensic Psychiatrist, together with the findings and recommendations contained therein.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgement

and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgement and sentence upon the Defendant's conviction of the offense of Sexual Assault in the First Degree, a felony, in manner and form as the State of West Virginia has charged in the **Second Count** of said Indictment, it is, therefore, accordingly adjudged and ORDERED that the Defendant, Charles Floyd Nesbitt, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for the indeterminate term and period of not less than fifteen (15) years nor more than thirty-five (35) years, pursuant to the terms and provisions of Chapter 61, Article 8B, Section 3, of the West Virginia code, as amended.

It is further adjudged and ORDERED that the conviction date shall be April 24, 1996, the sentence date shall be November 7, 1996, and the effective date of sentence shall be April 24, 1996, thereby awarding the Defendant credit for one hundred ninety-eight (198) days served while awaiting disposition in his case.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgement and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgement and sentence upon the Defendant's conviction of the offense of Sexual Assault in the First Degree, a felony, in manner and form as the State of West Virginia has charged in the **Third Count** of said Indictment, it is, therefore, accordingly adjudged

and ORDERED that the Defendant, Charles Floyd Nesbitt, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for the indeterminate term and period of not less than fifteen (15) years nor more than thirty-five (35) years, pursuant to the terms and provisions of Chapter 61, Article 8B, Section 3, of the West Virginia Code, as amended.

It is further adjudged and ORDERED that the conviction date shall be April 24, 1996, the sentence date shall be November 7, 1996, and the effective date of sentence shall be upon the completion of said Defendant's sentence imposed upon him in the Second Count.

Thereupon, the Court inquired of the Defendant if he had anything further to say or offer prior to judgement and sentence being pronounced against him, and no sufficient cause or reason to the contrary being shown or appearing to the Court, and the Defendant offering nothing in delay or arrest of judgement and sentence upon the Defendant's conviction of the offense of Sexual Assault in the First Degree, a felony, in manner and form as the State of West Virginia has charged in the **Fourth Count** of said Indictment, it is, therefore, accordingly adjudged and ORDERED that the Defendant, Charles Floyd Nesbitt, be confined and imprisoned in the Mount Olive Correctional Complex situate in Mount Olive, in Fayette County, West Virginia, for the indeterminate term and period of not less than fifteen (15) years nor more than thirty-five (35) years, pursuant to the terms and provisions of Chapter 61, Article 8B, Section 3, of the West Virginia Code, as amended.

It is further adjudged and ORDERED that the conviction date shall be April 24, 1996, the sentence date shall be November 7, 1996, and the effective date of sentence shall be upon the completion of said Defendant's sentence imposed upon him in the Third Count.

It is further adjudged and ORDERED that the sentences hereinabove imposed upon the Defendant for Counts Two, Three and Four shall run consecutively with each other, for a total sentence of not less than forty-five (45) years nor more than one hundred five (105) years penitentiary confinement.

It is further adjudged and ORDERED that the Defendant be and he is hereby committed to the custody of the Commissioner of the West Virginia Department of Corrections to be by the latter remanded to the custody of the Warden of the Mount Olive Correctional Complex situate at Mount Olive, Fayette County, West Virginia, to serve the sentence heretofore imposed upon the Defendant, and the Defendant be and he is hereby remanded to the custody of the Sheriff of Upshur County, West Virginia, to be by the latter placed in the Central Regional Jail situate in Braxton County, West Virginia, until such time as the Defendant is transported and delivered to the custody of the Warden of the Mount Olive Correctional Complex.

Thereupon, the Court advised the Defendant of his various rights of appeal to the West Virginia Supreme Court of appeals, and at the conclusion of which, counsel for Defendant advised the Court that the Defendant desired to file an appeal in this matter, and tendered to the Court his Notice of Intent to Appeal and Request for Transcripts.

It is further adjudged and ORDERED that the Clerk of this Court transmit a duly certified Commitment Paper to the Warden of the Mount Olive Correctional Complex situate at Mount Olive, Fayette County, West Virginia, pursuant to the provisions of Chapter 62, Article 7, Section 10 of the West Virginia Code, and any and all other papers and documents as required by the laws and statutes of the State of West Virginia.

It is further adjudged and ORDERED that the Clerk of this Court make and prepare four (4) certified copies of this Order, to be sent by United States mail to (1) William C. Thurman, Prosecuting Attorney, 38 West Main Street, Room 202, Buckhannon, WV 26201; (2) Counsel for the Defendant, James E. Hawkins, Jr., P.O. Box 2286, Buckhannon, West Virginia 26201, (3) Virgil D. Miller, Sheriff, Upshur County Sheriff's Department, 38 West Main Street, Buckhannon, West Virginia 26201, and (4) Commissioner, WV Department of Corrections, 112 California Avenue, Room 300, State Capitol Building, Charleston, WV 25305.

ORDER ENTER: November 13, 1996

/s/ T. H. Keadle
Judge of the Circuit
Court of Upshur County, WV